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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

FEDERAL HOME LOAN BANK OF SAN
 FRANCISCO,

Plaintiff,

v.

DEUTSCHE BANK SECURITIES, INC., et
 al.,
 Defendants.

No. CV-10-3039 SC &
 No. CV-10-3045 SC

**PLAINTIFF'S SUPPLEMENTAL REPLY
 IN RESPONSE TO UBS SECURITIES AND
 MORTGAGE ASSET SECURITIZATION
 TRANSACTIONS, INC.'S OPPOSITION
 TO MOTION TO REMAND**

Date: November 5, 2010
 Time: 10:00 a.m.
 Dept. Courtroom 1, 17th Floor

1 FEDERAL HOME LOAN BANK OF SAN
 2 FRANCISCO,
 3
 4 Plaintiff,
 5
 6 v.
 7 CREDIT SUISSE SECURITIES (USA) LLC,
 8 et al.,
 9
 10 Defendants.

11 UBS and MAST (referred to together as UBS) joined the other defendants in removing
 12 both of the Bank's actions to this Court on three invalid grounds of federal jurisdiction. The Bank
 13 moved to remand both cases, and all defendants jointly filed a single, omnibus opposition to the
 14 Bank's motions to remand. UBS also filed a separate opposition brief, to which the Bank
 15 responds in this supplemental reply.

16 UBS argues that the anti-removal provision of the 1933 Act did not prohibit removal of
 17 the *Deutsche Bank* action because the action falls under 28 U.S.C. § 1441(c), which permits a
 18 defendant to remove certain otherwise non-removable actions.¹ It is obvious from the text of that
 19 statute, however, that Section 1441(c) does not apply to this action. Indeed, that this argument is
 20 so implausible may explain why no other defendant was willing to join UBS in making it.

21 Section 1441(c) states:

22 Whenever a separate and independent claim or cause of action *within the*
 23 *jurisdiction conferred by section 1331 of this title* is joined with one or more
 24 otherwise non-removable claims or causes of action, the entire case may be
 25 removed and the district court may determine all issues therein, or, in its
 26 discretion, may remand all matters in which State law predominates.

27 28 U.S.C. § 1441(c) (emphasis added).

28 Two conditions must be satisfied for Section 1441(c) to apply. First, a claim or cause of
 action must be separate and independent from the non-removable claim. Second, that separate and

¹ UBS makes this argument only with respect to the *Deutsche Bank* action. It does not argue that
 Section 1441(c) applies to the *Credit Suisse* case.

1 independent claim must also be subject to federal jurisdiction under 28 U.S.C. § 1331. Although
2 the first condition may be satisfied in this action, the second requirement certainly is not.² There
3 is no claim against *UBS* in the *Deutsche Bank* action that is subject to federal jurisdiction under
4 Section 1331. Therefore, Section 1441(c) cannot apply.

5 Section 1331(c) provides that “[t]he district courts shall have original jurisdiction of all
6 civil actions *arising under* the Constitution, laws, or treaties of the United States.” (Emphasis
7 added.) The scope of the jurisdiction granted by Section 1331(c) (also referred to as “federal
8 question” jurisdiction or “arising under” jurisdiction) has been clearly defined by the United
9 States Supreme Court. An action “arises under” federal law “only when the plaintiff’s statement
10 of his own cause of action shows that it is based upon federal law.” *Vaden v. Discover Bank*, 129
11 S.Ct. 1262, 1272 (2009) (internal quotations and alteration omitted). This is known as the “well-
12 pleaded complaint” rule, and it is followed by every federal court in the United States. The
13 practical effect of the well-pleaded complaint rule is to “severely limit[] the number of cases in
14 which state law ‘creates the cause of action’ that may be initiated in or removed to federal district
15 court.” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983). The Bank
16 pleaded only state law claims against UBS in the *Deutsche Bank* action. None of those claims is
17 based on federal law, nor will the Bank have to refer to federal law in any way in order to prove
18 its case. Thus, none of the Bank’s claims is subject to federal question jurisdiction under Section
19 1331, and Section 1441(c) does not apply to the *Deutsche Bank* action.

20 UBS simply ignores the Supreme Court cases that define the scope of Section 1331. UBS
21 argues that if the Bank’s congressional charter creates federal jurisdiction, then the Bank’s action
22 will be subject to federal jurisdiction under Section 1331. For at least two reasons, this argument
23 makes no sense. First, the Bank’s claims for relief are not based on its charter. It is suing UBS
24 only under state law. At most, the Bank’s charter is relevant to determining whether or not a
25 federal court has subject matter jurisdiction. The charter is certainly not an affirmative element of

26
27 ² UBS argues that the Bank’s claims against it are “separate and independent” from the Bank’s
28 claims against the other defendants in the *Deutsche Bank* action. The Bank does not concede that its
claims against UBS are “separate and independent,” but the Court need not reach that question because the
second requirement of Section 1331 is certainly not satisfied in this action.

1 the Bank's claim, nor is there any credible reason why the Bank would even refer to its charter to
2 prove its claims in this action. Thus, there is no possible way that the Bank's claims could fall
3 under Section 1331.³

4 Second, the Bank's legislative charter is itself a federal statute. Even if the charter creates
5 federal jurisdiction (which it does not), then that jurisdiction would be based on the charter itself
6 – not on Section 1331. This point is not debatable. The Supreme Court held unequivocally in *Red*
7 *Cross* that a “sue and be sued” provision in a congressional charter is “a separate and independent
8 jurisdictional grant” that is “*outside the realm of statutory ‘arising under’ jurisdiction, i.e.,*
9 *jurisdiction based on 28 U.S.C. § 1331.*” *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247, 258 (1992)
10 (emphasis added).⁴ And because Section 1441(c) applies only to claims subject to jurisdiction
11 under Section 1331, it does not apply to claims subject to jurisdiction based on a congressional
12 charter.

13 The same reasoning explains why, even if the Bank is an agency of the federal
14 government (which it is not), still this action cannot fall under Section 1331. Defendants argue
15 that 28 U.S.C. § 1345 creates federal jurisdiction over cases that involve an agency of the United
16 States. (Omnibus Br. 21.) That jurisdiction, if it exists, is created by Section 1345 – not Section
17 1331.⁵

18 ³ UBS argues that the question whether the Bank's charter confers federal subject matter jurisdiction
19 is a “substantial federal question” under *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.* UBS
20 missed the point of *Grable*, which proves exactly the opposite point. The Supreme Court held that Section
21 1331 applies if there is a substantial federal question that is also a necessary component of the plaintiff's
22 affirmative case. 545 U.S. 308 (2005). For example, there may be defenses to state law claims that raise
23 substantial questions of federal law, but defenses cannot give rise to federal jurisdiction under Section
24 1331. Here, no analysis or interpretation of federal law is required to resolve the Bank's claims against
25 UBS; the Bank sued in state court, and is capable of proving its case in state court without any reference to
26 federal law. Moreover, even if this Court were to determine that the meaning of the Bank's charter
27 somehow presents a substantial federal question under *Grable*, the Court would have to resolve that
28 question to decide this motion to remand. Once that question is resolved on this motion to remand, there
would no longer be a “substantial federal question.”

⁴ UBS argues that “[w]hile a federal charter may provide an independent jurisdictional ground
eliminating the necessary application of the well-pleaded complaint rule, a federal charter also gives rise to
federal question jurisdiction because the claims arise from federal law.” (Omnibus Opp. Br. 6 n.5.) This
sentence is most likely an example of how UBS conflates statutory federal question jurisdiction under
Section 1331 with constitutional federal question jurisdiction.

⁵ UBS also misleadingly argues that “[c]laims seeking rescission of government contracts do ‘arise
under federal law as § 1331 requires,’ since the ‘federal common law of contracts applies to contracts with
PLAINTIFF'S SUPPLEMENTAL REPLY
IN SUPPORT OF MOTION TO REMAND

1 UBS may be conflating the *statutory* “federal question” jurisdiction of Section 1331 with
 2 the *constitutional* “federal question” jurisdiction of Article III of the United States Constitution.
 3 Article III defines the constitutional boundaries of federal jurisdiction: “The judicial power shall
 4 extend to all cases, in law and equity, arising under this Constitution, the laws of the United
 5 States, and treaties made, or which shall be made, under their authority.” Section 1331 uses
 6 similar language, but Congress intended it, and the Supreme Court has interpreted it, to grant
 7 jurisdiction much narrower than the Constitutional maximum. *Verlinden B.V. v. Central Bank of*
 8 *Nigeria*, 461 U.S. 480, 494-95 (1983).

9 Although the language of § 1331 parallels that of the “arising under” clause of
 10 Article III, this Court never has held that statutory “arising under” jurisdiction is
 11 identical to Article III “arising under” jurisdiction. Quite the contrary is true.
 12 Section 1331, the general federal question statute, although broadly phrased, has
 13 been continuously construed and limited in the light of the history that produced it,
 14 the demands of reason and coherence, and the dictates of sound judicial policy
 15 which have emerged from the [statute’s] function as a provision in the mosaic of
 16 federal judiciary legislation. It is a statute, not a Constitution, we are expounding.

17 *Id.* (internal quotations and emphasis omitted).

18 Section 1441(c) is very specific. It applies only to separate, independent claims that are
 19 subject to jurisdiction under Section 1331(c). That does not include claims subject to jurisdiction
 20 under Congressional charters or under Section 1345. This Court must decline to apply Section
 21 1441(c) to salvage defendants’ improper removal of the *Deutsche Bank* action to federal court.

22 the federal government,’ and ‘federal common law is part of the “laws of the . . . United States” for the
 23 purpose of § 1331 jurisdiction.’” (Omnibus Opp. Br. 7.) UBS cites one case, which belies its argument. In
 24 *Wright v. Foreign Service Grievance Board*, 503 F. Supp. 2d 163, 180 (D.D.C. 2007), the court held that a
 25 private party may be able to sue the government for rescission of a government contract based on
 26 misconduct by a government agency. To do so, the private party would have to sue under the
 27 Administrative Procedures Act and assert federal jurisdiction under Section 1331. Nothing in that case, or
 28 in any other that UBS cites, suggests that suits by the *government* (let alone a Federal Home Loan Bank
 that is not even an agency of the government) to rescind a private contract based on untrue and misleading
 statements under California common law is subject to federal jurisdiction under Section 1331. *See Empire*
Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 691-92 (2006) (“[U]niform federal law need not
 be applied to all questions in federal government litigation, even in cases involving government contracts.
 [T]he prudent course, we have recognized, is often to adopt the readymade body of state law as the federal
 rule of decision until Congress strikes a different accommodation.”) (internal citations and quotation
 marks omitted).

1 Dated: October 18, 2010

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